# Sazean Engineering & Construction Sdn Bhd v Bumi Bersatu Resources Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — APPEAL NO W-02(C)(A)-1904–10 OF 2016
DAVID WONG FCJ, ABANG ISKANDAR AND HASNAH HASHIM JJCA
7 JUNE 2018

*Companies and Corporations — Directors — Bankruptcy — Whether bankruptcy of one of two directors of company rendered passing of resolutions by board of directors illegal — Whether s 122(1) of the Companies Act 1965 ('the CA') was breached — Whether company had no capacity or locus standi to initiate any form of legal action or to engage solicitors — Whether bankrupt director's participation in passing of resolution was not a bona fide act that could be cured or saved by s 127 of the CA — Whether vacancy on board of directors created by bankrupt director's disqualification could not be filled by a de facto director or a substitute or alternate director — Whether board's incapacity to pass any resolution could not be ratified*

The respondent, a two-director company, had obtained three adjudication decisions ('the decisions') in its favour against the appellant and sought to register them in the High Court as judgments for the purpose of enforcement. The appellant, on the other hand, applied to set aside the decisions under s 15 of the Construction Industry Payment and Adjudication Act 2012 on the ground the respondent was not legally competent to pass any resolution at the material time to initiate the adjudication proceedings against the appellant. The appellant contended that at all material times, the respondent's board of directors ('BOD') had only one competent director as the other director ('Bernard Lim') was disqualified by law from being one as a result of being adjudged a bankrupt. The appellant said that the respondent's continued breach of s 122(1) of the Companies Act 1965 ('the CA') — which required a company to have at least two directors before it could act — robbed it of any capacity to apply to register the decisions as judgments, or to appoint solicitors to act on its behalf or to oppose the appellant's application to set aside the decisions. In dismissing the appellant's setting-aside application and allowing the respondent's application to register the decisions, the High Court held, inter alia, that: (a) s 122(1) of the CA had not been breached because the respondent had a de facto director ('Allan') who had filled in the vacancy on the BOD created by Bernard Lim's bankruptcy; and (b) in any event, s 127 of the CA saved any act of Bernard Lim/the respondent, on account of the bankruptcy, from being rendered null and void. The instant appeal was against the High Court's decision.

**Held**, unanimously allowing the appeal, setting aside the decision of the High Court and granting the appellant's application to set aside the decisions:

(1) The High Court erred in ruling that there was no breach of s 122(1) of the CA as there was a de facto director who filled in the vacancy in board of directors ('BOD') created by Bernard Lim's bankruptcy. The fact that the respondent was used to taking instructions from the so-called de facto director was of no avail. If even a substitute or alternate director could not qualify to fill in a vacancy in a company's BOD created by a resignation or vacation, it was far-fetched to argue that a de facto director could fill that vacancy. There was no mention of a de facto director in s 122 of the CA. A de facto director was only recognised as a director so that such a person and the company were held accountable for the acts done by that director. He was not intended to be equated to a properly appointed or elected director of a company. As such, Allan could never fill in the forced vacancy in the BOD created by Bernard Lim's bankruptcy. Consequently, as the number of directors on the respondent's BOD fell below the minimum required in law at the material time, it lacked the necessary locus standi and was not legally competent to pass the impugned resolutions to file the adjudication proceedings, appoint solicitors to act for the company or pursue any legal undertaking. The impugned resolutions were not only invalid but also illegal (see paras 36–38).

(2) Section 122(6) of the CA did not apply in this case to save the company from falling below the minimum number of two directors. That section would only apply if the director had voluntarily resigned or vacated his office. But Bernard Lim was disqualified by law from being a director on account of his bankruptcy. The law *required* him to vacate his office. He did not have a choice. In such a situation, s 122(7) of the CA provided that s 122(6) would not apply (see paras 30 & 45).

(3) The acts of Bernard Lim in relation to the impugned resolutions could not be saved by s 127 of the CA as both he and the respondent were aware of his bankruptcy at all material times. Bernard Lim and the respondent's BOD did not act bona fide and in good faith when the impugned resolutions were passed. Because of the operative words 'notwithstanding any defect that may afterwards be discovered in his appointment or qualification' in s 127 of the CA, that provision only saved acts of a director, manager or secretary which were done bona fide in the normal course of doing business for the benefit of the company and at the time those acts were done, the said persons did not know there was a defect in their appointment or qualification (see paras 58–60 & 63).

(4) There was no evidence of any ratification by the respondent in this case. In any event, the respondent's legal incapacity and the illegal passing of the impugned resolutions were not matters that could be ratified (see paras 64 & 66).

**[Bahasa Malaysia summary**

Responden, syarikat yang mempunyai dua pengarah, telah memperoleh tiga keputusan adjudikasi ('keputusan tersebut') yang menyebelahinya terhadap perayu dan memohon untuk mendaftarnya di Mahkamah Tinggi sebagai penghakiman-penghakiman bagi tujuan penguatkuasaan. Perayu, sebaliknya, memohon untuk mengetepikan keputusan tersebut di bawah s 15 Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 atas alasan responden tidak secara sah kompeten untuk meluluskan apa-apa resolusi pada masa matan untuk memulakan prosiding adjudikasi terhadap perayu. Perayu berhujah bahawa pada setiap masa matan, lembaga pengarah responden ('LP') hanya mempunyai seorang pengarah yang kompeten kerana pengarah yang satu lagi ('Bernard Lim') tidak layak dari segi undang-undang untuk menjadi pengarah akibat telah diputuskan sebagai seorang yang bankrap. Perayu mengatakan bahawa pelanggaran berterusan responden terhadap s 122(1) Akta Syarikat 1965 (AS') — yang menghendaki syarikat mempunyai sekurang-kurangnya dua pengarah sebelum ia boleh bertindak — telah menghapuskan apa-apa kapasiti memohon untuk mendaftar keputusan tersebut sebagai pengakiman, atau melantik peguamcara untuk bertindak bagi pihaknya atau membantah permohonan perayu untuk mengetepikan keputusan tersebut. Dalam menolak permohonan penepian perayu dan membenarkan permohonan responden untuk mendaftarkan keputusan tersebut, Mahkamah Tinggi memutuskan, antara lain, bahawa: (a) s 122(1) AS tidak dilanggari kerana responden mempunyai pengarah de facto ('Allan') yang telah mengisi kekosongan LP yang ditubuhkan oleh kebankrapan Bernard Lim; dan (b) dalam apa keadaan, s 127 AS menyelamatkan apa-apa tindakan Bernard Lim/responden, berkenaan kebankrapan itu, daripada menjadi terbatal dan tidak sah rayuan ini adalah terhadap keputusan Mahkamah Tinggi.

**Diputuskan**, sebulat suara membenarkan rayuan, mengetepikan keputusan Mahkamah Tinggi dan memberikan permohonan perayu untuk mengetepikan keputusan tersebut:

(1) Mahkamah Tinggi terkhilaf memutuskan bahawa tiada pelanggaran s 122(1) AS kerana terdapat pengarah de facto yang mengisi kekosongan lembaga pengarah ('LP') yang dtubuhkan oleh kebankrapan Bernard Lim. Fakta bahawa telah menjadi kebiasaan responden untuk mengambil arahan daripada pengarah de facto yang dikatakan itu tidak berfaedah. Jikapun seorang pengarah pengganti atau ganti tidak layak untuk mengisi kekosongan dalam LP syarikat yang ditubuhkan oleh peletakan jawatan atau kekosongan, ia terlalu sukar untuk berhujah bahawa pengarah de facto boleh mengisi kekosongan tersebut Tidak ada apa-apa yang disebutkan tentang pengarah de facto dalam s 122 AS. Seorang pengarah de facto hanya dikenali sebagai seorang pengarah agar seseorang itu dan syarikat itu dipertanggungjawabkan untuk perbuatan

yang dilakukan oleh pengarah tersebut. Dia tidak berniat untuk disamakan dengan pengarah syarikat yang dilantik atau dipilih sewajarnya. Oleh itu, Allan tidak boleh mengisi kekosongan paksaan dalam LP tersebut yang ditubuhka oleh kebankrapan Bernard Lim. Berikutan itu, oleh kerana bilangan pengarah pada LP responden kurang daripada jumlah minimum yang dikehendaki undang-undang pada masa matan, ia tidak mempunyai locus standi yang perlu dan tidak kompeten secara sah untuk meluluskan resolusi yang dipersoalkan untuk memfailkan prosiding adjudikasi, melantik peguamcara untuk bertindak untuk syarikat dan meneruskan apa-apa akujanji sah. Resolusi-resolusi yang dipersoalkan bukan sahaja tidak sah tetapi juga menyalahi undang-undang (lihat perenggan 36–38).

(2) Seksyen 122(6) AS tidak terpakai dalam kes ini untuk menyelamatkan syarikat daripada jatuh di bawah bilangan minimum dua pengarah. Seksyen tersebut hanya terpakai jika pengarah telah meletak jawatan atau mengosongkan jawatannya secara sukarela. Namun Bernard Lim telah hilang kelayakannya daripada menjadi pengarah oleh sebab kebankrapannya. Undang-undang menghendakinya mengosongkan jawatannya. Dia tidak mempunyai pilihan. Dalam keadaan sebegini, s 122(7) AS memperuntukkan bahawa s 122(6) tidak terpakai (lihat perenggan 30 & 45).

(3) Perbuatan Bernard Lim berkaitan resolusi-resolusi yang dipersoalkan tidak dapat diselamatkan oleh s 127 AS kerana kedua-dua dia dan responden menyedari tentang kebankrapannya pada setiap masa matan. Bernard Lim dan LP responden tidak bertindak secara bona fide dan berniat baik apabila resolusi-resolusi yang dipersoalkan diluluskan. Oleh kerana perkataan-perkataan operatif 'notwithstanding any defect that may afterwards be discovered in his appointment or qualification' dalam s 127 AS, peruntukan tersebut hanya menyelamatkan perbuatan seorang pengarah, pengurus atau setiausaha yang dilakukan secara bona fide dalam perjalanan melakukan perniagaan yang biasa untuk manfaat syarikat itu dan pada masa perbuatan tersebut dilakukan, orang tersebut tidak mengetahui terdapat kecacatan dalam pelantikan atau hilang kelayakan mereka (lihat perenggan 58–60 & 63).

(4) Tiada keterangan tentang apa-apa pengesahan oleh responden dalam kes ini. Dalam apa keadaan, ketidaupayaan responden dari segi undang-undang dan kelulusan resolusi-resolusi yang dipersoalkan yang menyalahi undang-undang bukan perkara-perkara yang boleh disahkan (liaht perenggan 64 & 66).]

**Notes**

For a case on bankruptcy, see 3(1) *Mallal's Digest* (5th Ed, 2018 Reissue) para 224.

**Cases referred to**

*Co-Operative Central Bank Ltd (in receivership) v Feyen Development Sdn Bhd* [1995] 3 MLJ 313, FC (refd)
*Goldtrail Travel Ltd v Aydin* [2014] EWHC 1587 (Ch), Ch D (refd)
*Hughes v Asset Managers plc* [1995] 3 All ER 669, CA (refd)
*Hydrodam (Corby) Ltd, Re* [1994] 2 BCLC 180, Ch D (refd)
*Jack James as administrator of ZYL Ltd* [2015] WASC 57, SC (refd)
*Phang Tat Meng t/a Tat Meng Co v Reka Cipta Solusi Sdn Bhd & Ors* [2016] MLJU 1897; [2016] 1 LNS 88, HC (refd)
*Rolled Steel Products (Holdings) Ltd v British Steel Corpn* [1986] Ch 246, CA (refd)

**Legislation referred to**

Bankruptcy Act 1967 s 38, 38(1)(d)
Companies Act 1965 ss 2, 4, 122, 122(1), (2), (6), (7), 125, 125(1), 127
Construction Industry Payment and Adjudication Act 2012 s 15
Corporations Act 2001 [AUS] ss 201A(2), 436A, 447A, Part 5.3A

**Appeal from:** Civil Suit No WA-24C-65–08 of 2016 (High Court, Kuala Lumpur)

*Alex De Silva (S Ravichandran and Vinisha Kaur Gill with him) (S Ravichandaran & Anuar) for the appellant.*
*Steven Sheah Shu Kin (PY Hoh & Tai) for the respondent.*

**Abang Iskandar JCA (delivering judgment of the court):**

SALIENT FACTS OF THE CASE

**[1]** There are three adjudication decisions made in favour of Bumi Bersatu Resources Sdn Bhd ('Bumi Bersatu') ie the claimant in the three adjudications. They are:

(a) adjudication decision dated 3 February 2016 given by the adjudicator, Edwin Lee Peng Khoon;

(b) adjudication decision dated 7 March 2016 given by the adjudicator, Lee Eu Kong; and

(c) adjudication decision dated 14 March 2016 given by the adjudicator, Ramsun Ho Chii Huey.

**[2]** Arising out of the said three adjudication decisions, Sazean Engineering and Construction Sdn Bhd ('Sazean Engineering'), as the respondent in the adjudication proceedings had filed an originating summons ('OS') No

WA-24C-65–08 of 2016 ('OS 65') praying for the three adjudication decisions to be set aside under s 15 of the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA 2012'). A

**[3]** Meanwhile, Bumi Bersatu as the successful claimant had filed three originating summonses for registering the three adjudication decisions above-mentioned, that were ruled in its favour. B

**[4]** Among the complaints of Sazean Engineering in the adjudication decisions were that, Bumi Bersatu does not have the capacity to proceed with the adjudication proceedings then, and now to oppose the various applications filed by Sazean Engineering, in particular the setting aside of the adjudication decisions and correspondingly, to proceed with the enforcement of the adjudication decisions as a judgment of the court. Arising out of that, the solicitors who represented Bumi Bersatu then in the adjudication proceedings and now in the various applications, do not have the authority to represent Bumi Bersatu because Bumi Bersatu had only one competent director when its board of director ('BOD') resolved to undertake the above matters. One of the two directors of Bumi Bersatu had been adjudged a bankrupt in 2012 ie, prior to the filing of the adjudication proceedings. C D E

**[5]** It was also argued that Bumi Bersatu, being a company, had ceased to exist and/or that at the very least, it was paralysed from bringing the adjudication proceedings and now, from opposing the applications to set aside the adjudication decisions. Therefore, the adjudication decisions were null and void for illegality and ought to be set aside. F

**[6]** It has to be noted that in the adjudication proceedings, there was no payment response filed and neither was there an adjudication response filed by Sazean Engineering which led the learned adjudicators to give the adjudication decisions in all the three adjudications in favour of the claimant Bumi Bersatu. G

FINDINGS OF LEARNED HIGH COURT JUDGE

**[7]** The High Court had, at a later date, struck out the claim against the second defendant, Bernard Lim, the bankrupt director, after the senior federal counsel from the official assignee's office, confirmed that no leave of court had been obtained by Sazean Engineering to proceed against Bernard Lim. H

**[8]** The High Court judge also had dismissed OS 65 of Sazean Engineering for the setting aside of the three adjudication decisions with costs of RM5,000 to be paid to Bumi Bersatu and allowed the enforcement of the three adjudication decisions in the three OSs. Thus, this appeal by Sazean Engineering. I

A THE APPEAL

**[9]** We heard the appeal on 8 November 2017 and had reserved our decision to a later date for further deliberation by us, and that the parties would be duly informed of the date for its delivery once a decision on this appeal is reached by this panel. This now is our decision and our reasons for having so decided.

**[10]** Before us, Sazean Engineering, being the appellant and plaintiff in the High Court, identified and raised four main issues, namely:

(a) whether Bumi Bersatu had purportedly procured the three adjudication decisions through fraud and whether there was a breach of natural justice due to the bankruptcy of a director of Bumi Bersatu company;

(b) whether Bumi Bersatu as a company purportedly ceases to exist because of the bankruptcy of one of its directors;

(c) whether Bumi Bersatu's solicitors have the authority to represent Bumi Bersatu; and

(d) whether the learned judge has failed to consider the issue of statement of final account and stop work orders.

THE CONTENTIONS AND OUR FINDINGS

**[11]** In the main, this appeal has been succinctly described by the learned counsel for Sazean Engineering as follows: 'This appeal raises a short but important point with regards to the effect an undischarged bankrupt director has on a company with only two directors on the BOD of the company. Learned High Court judge held that the fact that one of the two directors in Bumi Bersatu was an undischarged bankrupt did not render Bumi Bersatu's actions, subsequent to the director being adjudged a bankrupt, null and void pursuant to the saving provision of s 127 of the Companies Act 1965 ('the CA 1965')'.

**[12]** We are of the view that such description would fairly encapsulate the essence of this appeal. As such, we are of the view that the issues stated as 'a', 'b' and 'c' above in para 13, may be taken together as they had related to the issue of the impugned status of the director who was undisputedly an undischarged bankrupt at the material times, to wit, the filings of the adjudication action and the appointment of the solicitors to represent Bumi Bersatu in matters pertaining to the adjudication proceedings and beyond.

**[13]** In the course of this appeal, we had been referred to certain provisions in the CA 1965 and the Bankruptcy Act 1967 ('the BA 1967'). A timeline showing the relevant events was also featured. There was no dispute pertaining

to the timeline. The dispute has always been the effect of bankruptcy of a director in a two-director company and what is the true effect, to wit, the pith and substance, of s 127 of the CA 1965 in the context of the issues raised before the learned High Court judge, as well as before this court.

**[14]** The position of Bumi Bersatu on these issues must be stated, albeit in essence, it had found expression in the judgment of the learned High Court judge who had interpreted s 127 of the CA 1965 as being capable of bringing the factual circumstances of this case well within its legal embrace. It is worth noting that Bumi Bersatu had submitted that Sazean Engineering's appeal was 'baseless and without merit at all'. Needless to say, it had supported the learned High Court judge's decision to the hilt.

THE LEGALITY ISSUE

**[15]** For clarity, we shall describe these issues as: (1) the legality issue or the locus issue; and (2) the s 127 of the CA 1965 issue. We shall first deal with the issue of Bumi Bersatu operating with only one valid/competent director at the material times and we term this as the legality issue. It was contended by Bumi Bersatu before us, that at all material times, there was a de facto director in the person of Allan or, that the law is silent on the effect of just having one director on the BOD. As such, it was therefore wrong to suggest, as did Sazean Engineering, that Bumi Bersatu had lost its legal capacity when Bernard Lim was declared a bankrupt and had remained undischarged as such, at the material times when the resolutions were passed for Bumi Bersatu to pursue and prosecute its rights against Sazean Engineering.

**[16]** Bumi Bersatu argued that since s 4 of the CA 1965 defined a 'director' to include a de facto director and a shadow director, then the presence and involvement of one Allan whose instructions the other director was accustomed to follow, would mean that there was no vacancy or gap left on the BOD of Bumi Bersatu by reason of Bernard Lim's act of bankruptcy. Section 4 of the CA 1965 defines a director as follows:

> Section 4: Interpretation
>
> 'director' includes any person occupying the position of director of a corporation by whatever name called and includes a person in accordance with whose directions or instructions the directors of a corporation are accustomed to act and an alternate or substitute director;

**[17]** So, in fact and in law, there are at least three categories of directors. The first category would be the director of a company that is elected by the members of the company to sit on the BOD and formulate policies for the company in moving forward and create wealth for the benefit of the company.

Such directors have their names registered as directors on the register kept with the Companies Commission Malaysia ('the CCM'). The second and the third categories may be dealt with together, they are the substitute and the alternate directors. A director from these two categories does not sit at board regular meetings but would only sit if the usual or principal director is unable, for some reason, to so attend a BOD meeting. If a registered company has these categories of directors, a company search at a CCM office would reveal these directors' names as such.

**[18]** However, s 122(2) of the CA 1965 clearly stipulated that a substitute or an alternate director would not qualify as a director for the purpose of filling in a mandatory vacancy that has brought the number of the remaining directors of the BOD to dip below the minimum number allowed by law. And then, there are persons who neither fall into any of the above-mentioned three categories of directors, but yet they give instructions which are usually followed and carried out by members of the BOD of a company. These persons do not have their names registered as directors of a company but the sitting members of the company's BOD are 'accustomed to act' on their instructions. Under this category one may find a 'de facto' director or otherwise known as an informal director as he is never formally appointed as a director. And lastly, there is another sub-species that learned author Walter Woon, among others, would describe as a 'shadow' director. He had described this person as 'a rather sinister individual' who is 'in actuality a puppeteer. He pulls the strings and his puppets on the board dance'. And if we may add, the puppets would not just dance, but they would dance to the music or tune of the puppeteer. But, this informal or de facto and shadow director are treated as a director under the CA 1965 for the purpose of attaching liability on them as by their conduct, the law attaches on them a fiduciary duty which they owe to the company which they seek to control or 'orchestrate' (see, *Walter Woon on Company Law* (2nd Ed) Sweet and Maxwell Asia). For a useful differentiation between a de facto director and a shadow director, see the judgment of Millet J in the case of *Hydrodam (Corby) Ltd, Re* [1994] 2 BCLC 180 (High Court of England).

**[19]** As such, although the law as per the definition of a director under the CA 1965 may capture a de facto and a shadow director in its wide definition, however such a person is recognised as a director not in a positive way. In the context of this case, if Allan was meant to be a directing mind why he was not appointed as such onto its BOD by Bumi Bersatu even after Bernard Lim was declared as a bankrupt in 2012, or at the latest in 2014 when Bernard Lim allegedly only became aware of his own bankruptcy. Allan may indeed be a de facto director in the minds of the directors of Bumi Bersatu, but the law does not permit Allan, in such a capacity to fill in the vacancy created by Bernard Lim's bankruptcy. By way of reiteration, if even neither a substitute nor an alternate director is not legally recognised to be a director as envisaged under s

122(2) of the CA 1965, we find no difficulty at all, in rejecting the notion that a de facto and a shadow director could properly and legitimately fill in the void so created.

**[20]** It would be very curious indeed that, in light of express legislative framework, a person may just be shooed in as a director in total disregard to statutory provisions on appointment of a director, just so that a vacancy created by a disqualification of a bankrupt director may be filled up. The learned counsel for Bumi Bersatu did not cite to us any authority to support his contention to that effect. With respect, we can find no merit in that contention on the director issue that was sought to be impressed upon us by learned counsel on behalf of Bumi Bersatu.

**[21]** Premised on that, we are in agreement with the contention made on behalf of Sazean Engineering that when the impugned board resolutions were passed by Bumi Bersatu, its BOD membership had dipped below the statutory minimum number of two directors that was required under the law then in force. The bankruptcy of Bernard Lim before the impugned board resolutions were passed by Bumi Bersatu had occasioned a vacancy to be created. Bumi Bersatu did not appoint any new competent director in Bernard Lim's place even as late as 2014 and Allan being someone akin to a de facto or shadow director, with respect, could not fill up that vacancy so created.

**[22]** As a direct result thereof, Bumi Bersatu's BOD had acted illegally when Bernard Lim was declared a bankrupt and when no valid replacement director was appointed in his place. As a bankrupt, Bernard Lim cannot in law act as a company director. It is an act that is legally prohibited not only under the CA 1965 but also under the BA 1969. As a direct consequence thereof, such impugned resolutions are illegal as they were issued without legal basis, as Bumi Bersatu's BOD at those material times was legally incapacitated, as its membership had dipped below the minimum legal requirement under s 122(1) of the CA 1965. This matter is one that is beyond ultra vires and as such it is beyond the realm of ratification as well. When Bumi Bersatu did finally appoint a competent director to replace Bernard Lim, it was done post the impugned resolutions.

**[23]** So, the threshold issue really is whether the effect of bankruptcy of Bernard Lim had rendered the BOD of Bumi Bersatu to be legally incompetent for being devoid of legal standing, in view of the fact that Bernard Lim's bankruptcy had left Bumi Bersatu's BOD with only one valid director, thereby breaching the mandatory statutory requirement under s 122(1) of the CA 1965 which dictated that a BOD of a company registered under the CA 1965 must, at all times, have at least two directors on its BOD.

**[24]** We had looked at s 122 of the CA 1965 and even at first blush, we could discern the intention of Parliament when it drafted this provision in the CA 1965. In sub-s (1) it declared that a company registered under the CA 1965 must have a minimum number of two directors sitting on its BOD at any given time. This sub-s (1) provided for the constitution of a company's BOD in terms of its minimum numerical composition.

**[25]** In this regard s 122(1) of the CA 1965 is relevant. Having stated as such, it further stated that an alternate director or a substitute director shall not count as a valid replacement to the BOD, should one of the two directors quit or resign from the BOD or becomes disqualified to remain as a director under the law. Under the law, an undischarged bankrupt is disqualified from becoming a director of a company (see s 125 of the CA 1965 and s 38 of the BA 1967). In fact, regulation 72, table A of the articles of association of Bumi Bersatu itself clearly stipulates that:

> The office of director shall become vacant if the director —
>
> (a) ...;
>
> (b) becomes a bankrupt or makes an arrangement or composition with his creditors generally;
>
> (c)–(h) ...

**[26]** The articles of association was part of the requirements under the then CA 1965 and compliance was mandatory. It was akin to a constitution for a corporation. In that regard, in this case regulation 72 states that the office of the director of a company falls vacant, when he becomes a bankrupt, and there was no mention when he became aware of the fact of bankruptcy, having been obtained against him. Section 38(1)(d) of the BA 1967 provides that:

> (d) the bankrupt shall not, except with the previous permission of the Director General of Insolvency or of the court, enter into or carry on any business either alone or in partnership, or *become a director of any company or otherwise directly or indirectly take part in the management of any company;* (Emphasis added.)

**[27]** Whereas s 38(1)(d) of the BA 1967 prohibits a bankrupt from becoming a director of a company (except with leave of the DGI or the court) regulation 72 reiterated that embargo on a bankrupt remaining as a director by providing expressly that the office of a director shall fall vacant when he is declared a bankrupt.

**[28]** The other relevant provisions that must be given due consideration must be s 122(6) of the CA 1965. In all fairness, the learned High Court judge did refer to this provision. Having considered this provision, he was of the view that it would prevail over regulation 72 as the need to maintain the minimum

number of two directors was paramount in a case where there were only two directors being the minimum allowed under the law (see s 122(1) of the CA 1965 on the BOD, as was Bumi Bersatu in this case).

**[29]** But then we were referred to s 122(7) of the CA 1965 by the learned counsel for Sazean Engineering. This provision has direct implication on the application of s 122(6) of the CA 1965 which immediately precedes it.

**[30]** With this provision as contained under s 122(7) of the CA 1965 the perceived need to save a two-directorship company at all costs was placed under scrutiny. We have had occasion to look at s 122(6) of the CA 1965 again. Having done so, we observed that the underlying theme that governs the operation of that provision is that such provision only applies in cases where the act of resigning or vacating his office as a director emanates from the director himself or herself. Our view as such was premised upon the existence or presence of the phrase '... a director of a company *shall* not resign or vacate his office if ...'. It is our considered view that such phrase refers to an affirmative or positive acts attributable to the director himself or herself in wanting to resign as a director or vacating his or her office of a director. In other words, that phrase refers to a voluntary act on the part of a director, to either resign or vacate the office of a director. In such a situation, s 122(6) of the CA 1965 has gone on to state that such resignation or vacation of office shall be deemed as *invalid, if it has the effect of reducing the number of directors of the company below the minimum number required by sub-s (1).*

**[31]** So, having considered these two subsections to s 122 of the CA 1965 together, we are of the considered view that the existence of s 122(7) of the CA 1965 effectively debunked any such perception *that in all situations,* the number of directors on the BOD of a company must be maintained such that it would not go below the minimum number, as required under sub-s (1) of s 122 of the CA 1965. We say so because the opening words of s 122(7) of the CA 1965 are indeed telling. They go straight at addressing the operation of the preceding sub-s (6). We reproduce s 122(7) of the CA 1965 below:

> (7) *Subsection (6) shall not apply* where a director of a company is *required* to resign or vacate his office if he has not within the period referred to in subsection 124(1) obtained his qualification or *by virtue of his disqualification under this Act or any other written law.* (Emphasis added.)

**[32]** Again, the choice of words employed by Parliament can be clearly seen in the opening phrase, to wit, '(7) Subsection (6) shall not apply where a director of a company is required to resign or vacate his office ...'. Within that phrase, the critical words are '... is *required* to resign or vacate'. We saw a deliberate intention on the part of Parliament when such phrase was inserted in s 122(7). Section 122(6) provided for a situation where the resignation or

vacation was initiated on the director's own volition, namely voluntary act, whereas sub-s 122(7) provided for a situation where the director would have no choice as the law as contained in sub-s (7) required him or her to resign or vacate the office of a director, on the happening of certain specified events as stipulated therein. Inter alia, such an event has been 'by virtue of his disqualification under this Act or any other written law'.

**[33]** Thus, if the dictates of s 122(7) of the CA 1965 are met, s 122(6) of the CA 1965 would have no application. It was submitted before us by learned counsel for Sazean Engineering that the factual matrix in this instant appeal would negate the operation of s 122(6) of the CA 1965. Section 122(6) of the CA 1965 must be read and be interpreted in a manner such that its objective is achieved and instead, not to create a mischief, however unwittingly. Now, sub-s 122(6) of the CA 1965 was intended to negate any move coming from a director who, by resigning his office as a director, would have the effect of defeating the purpose of sub-s (1) of s 122 of the CA 1965 which was to ensure that the number of directors of a BOD must not dip below the minimum number so as to render the company to be incapacitated and dysfunctional and lacking in locus. Subsection (6) had the intended effect of negating such a move by such a director. That was all there was to it. It was however, not an absolute provision. Its purview of operation did not seek to forgive directors who are otherwise disqualified by operation of law. In abundance of caution and in its wisdom, Parliament had therefore, in order to dispel all doubts, legislated sub-s (7) whereby a director cannot remain in office if, on the occurrence of certain events as stipulated thereunder, he was required to vacate the office of a director.

**[34]** When a scenario is made out as envisaged under sub-s (7) of s 122 of the CA 1965 a director had no option but to vacate his office. He had no choice. It is a legal imperative embedded in statute. Subsection (7) sought to rein in s 122(6) of the CA 1965. Subsection (7) ensures that a company is run according to law, in so far as the status of a director is concerned. While sub-s (6) by operation of law seeks prevent a company from breaching the minimum number of the directors as a result of a voluntary resignation or vacating of office by a director or directors by invalidating such resignation, sub-s (7) makes it clear that such safety net is withdrawn if the vacating of a director's office is occasioned by his disqualification by law.

**[35]** If a company is left with only one director because the only other director is required to *vacate* his office due to a disqualification, the company has a duty to appoint a new director so as to fulfil the dictates of sub-s (1) of s 122 of the CA 1965. It cannot persist with a BOD consisting of a director who had been declared a bankrupt and who at all material times remained an undischarged bankrupt. Section 122(6) of the CA 1965 could not avail itself in

such a situation. Section 122(7) of the CA 1965 said so, loud and clear. A BOD that issues a resolution when it is so incompetent would be committing an act that would militate against the CA 1965.

**[36]** Under the CA 1965, a one-man director BOD did not have any power to act as a competent and properly constituted BOD. Such a BOD did not have any business in issuing any board resolution in the name of the company. It goes to the question of power, not merely the question of exceeding the objects of the company. Any such resolution so passed, would be not only invalid but also illegal. It is beyond ultra vires. It is a locus issue.

**[37]** Reverting to the issue of de facto directors, suffice for us to say that for the purpose of fulfilling s 122(1) of the CA 1965, the fact that Bumi Bersatu was used to take instructions from the so called de facto director as defined under s 2 of the CA 1965, would be to no avail to Bumi Bersatu. Even a substitute or an alternate director does not qualify to fill in that vacancy in an event that situation arises whereby the company finds itself short of the minimum number of director(s) on its BOD. If even a substitute or alternate director is not recognised to fill in the gap created by a resignation or vacation, it would be fetching it too far to argue that a de facto director could instead be acceptable. We noted that a de facto director was never even in discussion by way of any mention, within the scheme of s 122 of the CA 1965 itself. A de facto director was never within the contemplation of the legislators whenever the sufficiency of the minimum number of a BOD comes up for consideration. Such omission must in itself be telling and deliberate. Again, at the risk of being repetitive, a de facto director is only recognised in order that such a person and the company be held accountable for the acts done by such person. It is not intended to be equated to a properly appointed or elected director of a company. As such, though Allan for instance, may well qualify as a de facto director of Bumi Bersatu, he could never fill in the forced vacancy created as a result of Bernard Lim's act of bankruptcy. With respect, we agree with learned counsel for Sazean Engineering that the learned High Court judge was in error when he ruled that there was no breach of s 122(1) of the CA 1965 as there were de facto directors to fill in the vacancy caused by Bernard Lim's bankruptcy.

**[38]** Cumulatively, it therefore means that Bumi Bersatu's BOD had, at the material times, fallen below the minimum requirement, as far as the number of directors was concerned. The effect is that it had lacked the necessary legal standing or locus standi as a competent BOD. Its BOD was not legally competent to act against any party, by filing for the adjudication proceedings nor pursue any legal undertaking such as appointing solicitors to act on behalf of Bumi Bersatu.

**[39]** We also had occasion to refer to a Western Australian case of *Jack James*

*as administrator of ZYL Ltd* [2015] WASC 57 ('*ZYL*'s case'). The Supreme Court of Western Australia in that case was asked for guidance by the administrator, who had been appointed by the two remaining directors, leaving the company in a position where the remaining number was below the minimum number as prescribed by the Australian Corporations Act 2001. The statutory minimum numerical requirement being three directors at any given time. The appointed administrator being concerned about the validity of his appointment by the BOD consisting of the two remaining directors applied to the court for guidance. It therefore had pertained to the question surrounding the ability of the remaining directors to conduct the board business.

**[40]** To digress a little, it must be noted that it was not unusual in times of financial hardships that a director or directors of such a company to resign from their office as a director. Sometimes such resignation may lead to the number of members of BOD to fall below the minimum allowed by law. We have seen s 122 of our CA 1965 on the minimum number of directors that must exist on the BOD at any given time. The minimum number was two directors. We have seen what sub-s (6) of s 122 of the CA 1965 had sought to achieve. And of course, what sub-s (7) of the same s 122 sought to provide for, as well. In our present appeal, the learned High Court judge applied sub-s (6) of s 122 and ruled that Bumi Bersatu could not be allowed to dip below the minimum number of directors despite Bernard Lim's bankruptcy. Of course, it had become clear that the learned High Court judge did not consider sub-s (7) of s 122.

**[41]** Coming back to the *ZYL*'s case when the board resolution of the company was issued appointing the administrator to his office, the company at that time had only two directors on the board as the third director had resigned in December 2014. Under the Corporations Act 2001 of Australia there must be at least three directors on the BOD at any given time. Concerned as he was with the situation pertaining to his appointment, especially whether the company had breached s 201A(2) for the validity of the resolution appointing him by the two remaining directors, the administrator had thus filed this application for guidance from the court. The view of the company as per the advice of their legal counsel (pre administration stage) was that the resolution was valid as, inter alia, the company's constitution provided in cl 15.3 for a quorum of two directors at any meeting of directors. Clause 15.8 of the constitution of the company also provided for the remaining directors to convene but could only do *limited* business of appointing a director or directors or in order to convene a general meeting of the company. As such, it was opined that the company's non-compliance with s 201A(2) did not derogate from the validity of the resolution that appointed the administrator. The administrator was however not fully convinced by the arguments of the pre-administration

advisers. In common parlance, the administrator's application was done in abundance of caution. A

**[42]** The ultimate decision by the Supreme Court in the *ZYL*'s case was not actually determinative of the question that it was asked to answer. But what it had decided was that the appointment was valid and among others, it had invoked certain statutory powers given to the court under s 447A of the Corporations Act 2001 to order Part 5.3A of the Act to apply in relation to the company to the effect that notwithstanding any non-compliance with s 201A(2) of the Act, the administrator was validly appointed pursuant to s 436A on 8 January 2015. The facts seemed to convince the Supreme Court that the remaining directors had acted in good faith in that it was in the best interests of the company that an administrator be appointed as the company appeared to be insolvent and that the interests of creditors and members would then be better looked into and dealt with after the administrator's investigations had come to a close. B C D

**[43]** This *ZYL*'s case to our mind, deserved mention because it helped shed some light as to the concerns that could and should arise when the number of remaining directors on the BOD fell below the minimum statutory requirements. This concern had found statutory expression in s 122 of our CA 1965. We noted that the reduction in the number of directors in the *ZYL*'s case was occasioned by the *resignation* of the crucial third director in December 2014. That fact, to our mind, is critical in appreciating the different approach which our courts may take in dealing with such a situation. Because the vacancy in *ZYL*'s case was caused by a voluntary resignation, if that was to happen in our jurisdiction, sub-s (6) of s 122 of the CA 1965 would kick in. If the resignation had caused the number of remaining directors to fall below the minimum threshold as required by statute, such a voluntary resignation would be of no legal effect and therefore void. Subsection (6) would not allow the number to go under, so to speak, so as to maintain compliance with the minimum number of directors on the BOD, if it has been caused by a *voluntary* resignation of a director or directors. E F G

**[44]** However, in our instant appeal, the undisputed fact had been that Bernard Lim was a bankrupt and an undischarged one, *post* 2012 when he continued to act as a director of the Bumi Bersatu. His bankruptcy disqualified him from holding the office of a director. Regulation 72 of Bumi Bersatu's own articles stipulated to that effect. Section 125 of CA 1965 prohibits a bankrupt from becoming a director or being involved in the management of a company. Provisions in the BA 1967 even provide for punitive sanctions against a bankrupt who acts as a director in spite of his unenviable status. He commits contempt of court if he continues to do so. His status as a bankrupt has put him and Bumi Bersatu in an untenable position. No court ought to countenance his H I

A continued involvement in running the business of a company. Let alone in the position of a director, where he would invariably, together with the other director of the company, form the alter ego of the company. The law does not allow a party to benefit from its own wrongful conduct. It would be inimical, as being against public policy and principles of good corporate governance for
B the court to condone such corporate behaviour.

**[45]** Bernard Lim's disqualification as a director *requires* him to vacate his office as a director of Bumi Bersatu as a matter of law. In that regard, he had no
C choice but to so vacate. Subsection (7) of s 122 of the CA 1965 recognised that situation and further mandated that in such a situation, the immediately preceding sub-s (6) could not be invoked to prevent a company from falling below the minimum number of directors. This appeal is concerned with a *disqualification* of a director by operation of law, not with a voluntary
D *resignation* of a director. We can see the different legal implications obtaining as a direct consequence of either event happening.

**[46]** It had been said that the *ZYL*'s case had been a timely reminder that administrators take reasonable steps to satisfy themselves in relation to the
E validity of their appointment as such. It does impact on corporate governance issue as well. With respect, we agree with the view expressed above by Richard Johnson, RITF in *Australian Insolvency Journal*, Vol 27 1/2015 when analysing the impact of the *ZYL*'s case on the Australian corporate landscape. On the same token, mutatis mutandis, solicitors should also take reasonable steps to
F satisfy themselves of the validity of their appointment in cases, especially on the status of the director where the new law now recognises a one-director company.

**[47]** In the circumstances of the appeal presently before us, the moment
G Bernard Lim was declared a bankrupt in 2012, his office as a director fell vacant by operation of law. Regulation 72 of the Article of Bumi Bersatu expressly provided for that. When that happened, the BOD of Bumi Bersatu had only one competent director left. Because the vacancy of Bernard Lim's office had fallen vacant by operation of law, s 122(7) of the CA 1965 kicked in and the
H number of directors on BOD of Bumi Bersatu had dipped below the minimum statutory number as required under the law obtaining at that time. That event had rendered the remaining BOD as being an incompetent one whereby it had been stripped of its powers to function as a competent BOD that was properly constituted under the law to pass board resolutions for the company to engage
I in business undertakings. In other words, with Bernard Lim's bankruptcy in 2012, the BOD of Bumi Bersatu had no locus standi to act as a proper BOD as envisaged under the CA 1965, simpliciter.

**[48]** Premised upon the above, we agree with learned counsel for Sazean

Engineering, that at all material time, Bumi Bersatu had only one valid director left. Such a BOD could not, in law, pass any valid board resolution for Bumi Bersatu. In effect, the BOD of Bumi Bersatu was rendered legally impotent from discharging its functions as such under the law. Any resolution purportedly passed by such an incompetent BOD must be one that is null and void and of no legal effect.

**[49]** As a direct consequence of that therefore, Bumi Bersatu did not have a legally competent BOD as envisaged under s 122 of the CA.

**[50]** We cannot, with respect, agree with the contention of Bumi Bersatu that the vacancy created by Bernard Lim's bankruptcy could be filled in by de facto directors such as Allan whose instructions the company was accustomed to follow and act on. A substitute or an alternate director cannot fill in a vacancy created by a resignation of a director. It would be incorrect to say that a de facto director can legally fill in such a vacancy so as to remedy the breach of the minimum number required by law. A person such as a de facto director is recognised as a director only for the purpose of attaching liability on him by innocent third parties who had acted to their detriment when transacting with a company acting on the instructions of such de facto directors.

**[51]** As such, in the circumstances of this case, the impugned resolutions purportedly passed by Bumi Bersatu involving Bernard Lim post 2014, at least, were invalid and of no legal effect because when they were passed, the BOD of Bumi Bersatu had no locus standi as for all intents and purposes, it had only one director, thereby was in breach of s 122 of the CA that mandated that every company registered under the CA 1965 must have at least two directors at any given time.

**[52]** In this regard, we would, with respect agree with learned counsel for Sazean Engineering that in the circumstances of this case, the determination by us of this issue on the effects of the bankruptcy of one of a company's director in the case of a company with two-director BOD would in fact effectively settle the ultimate outcome of this appeal. To our minds, in the context of this case, it has rendered the BOD losing its legitimacy as a legally competent decision-making organ for Bumi Bersatu. In other words, there was no legally competent BOD after Bernard Lim was declared a bankrupt and when Bumi Bersatu did not appoint a new director to replace Bernard Lim in order that Bumi Bersatu could reconstitute its BOD as a legally competent one in order to legally run Bumi Bersatu. In short, it is a locus issue as opposed to an ultra vires issue. But having said that, we are not saying that Bumi Bersatu had ceased to exist as a corporate entity, just because it had a legally incompetent BOD. There was no evidence led before us to evince that it had been deregistered, nor had it been wound up.

A SECTION 127 OF THE CA 1965 ISSUE

**[53]** However, as alluded to above by us, the issue surrounding the impugned acts of Bernard Lim acting as a director when in fact and in law, he was a bankrupt had raised the interesting question as between the litigating parties regarding the legal effects of those acts on a two-director BOD such as Bumi Bersatu and whether those acts by Bernard Lim are saved by the operation of s 127 of the CA 1965.

**[54]** As much had been said on this issue during submissions and indeed its consideration by the learned High Court Judge in coming to his decision, we find it necessary to consider the same, especially in relation to the important question as regards the extent of the application of s 127 of the CA 1965 to acts that were attributable to Bernard Lim. The question has now become whether the impugned acts attributable to Bernard Lim can be saved under s 127 of the CA 1965.

**[55]** Section 127 of the CA 1965 states as follows:

> 127 Validity of acts of directors and officers.
>
> The acts of a director or manager or secretary shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or disqualification.

**[56]** As to the effect of acts of a director who was an undischarged bankrupt when such acts were done by him, the contention by Bumi Bersatu was that while such impugned acts may subject the undischarged bankrupt to penal sanctions, those same acts are nevertheless saved by the so-called saving provisions as contained under s 127 of the CA 1965. For this proposition, the case of *Phang Tat Meng t/a Tat Meng Co v Reka Cipta Solusi Sdn Bhd & Ors* [2016] MLJU 1897; [2016] 1 LNS 88 ('*Phang Tat Meng* case') was cited to us in support. In that case, the Federal Court case of *Co-Operative Central Bank Ltd (in receivership) v Feyen Development Sdn Bhd* [1995] 3 MLJ 313 ('*Feyen* case') was referred to, in particular, the speech by learned Justice Edgar Joseph Jr FJ, which was reproduced to bolster its contention as such. At p 321 the learned apex court judge had said:

> Nevertheless, the general rule is that a contract, the making of which is prohibited by statute expressly or by implication, and which stipulates for penalties for those entering into it, shall be void and unenforceable, unless the statute itself saves the contract or there are contrary intentions which can reasonably be read from the language of the statute itself (see *Holman v Johnson* (1775) 98 ER 1120 at p 1121; *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 MLJ 356). However, the general rule is subject to exceptions and, at the end of the day, it is a question of construction of the particular statute. This point was aptly put by Gibbs CJ in *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* [1978] 139 CLR

410 thus:

> It is often said that a contract expressly or impliedly prohibited by statute is void and unenforceable. That statement is true as a general rule, but for complete accuracy it needs qualification, because it is possible for a statute in terms to prohibit a contract and yet to provide, expressly or impliedly, that the contract will be valid and enforceable. However, cases are likely to be rare in which a statute prohibits a contract but nevertheless reveals an intention that it shall be valid and enforceable, and in most cases it is sufficient to say, as has been said in many cases of authority, that the test is whether the contract is prohibited by the statute. Where a statute imposes a penalty upon the making or performance of a contract, it is a question of construction whether the statute intends to prohibit the contract in this sense, that is, to render it void and unenforceable, or whether it intends only that the penalty for which it provides shall be inflicted if the contract is made or performed.

**[57]** We had sight of the *Feyen* case and in dealing with s 127 of the CA 1965, we noted that the apex court did not dissect it in such a way as to express its view on the meaning of the phrase 'notwithstanding any defect that may afterwards be discovered' which to our minds provides for a qualifier.

**[58]** To our minds, that qualifier is rather huge, in its effect. One thing for sure, it does not exempt or forgive all acts that have been done by a director or a manager or an officer of a company. Rather, it is quite circumscribed in the ambit of its intended embrace. To our minds, s 127 of the CA 1965 only saves acts done by such persons if those acts have been done bona fide in the course of doing business for the benefit of the company they belong to. We say so because of the existence of the phrase 'notwithstanding any defect that may afterwards be discovered in his appointment or qualification'.

**[59]** To our considered minds, that qualifier as contained under s 127 of the CA 1965 conveys quite clearly that when a director does those acts, they were done in the normal course of business on the premise that there is nothing amiss with regards to his appointment or qualification as a director. During that time, neither the director nor the BOD nor the third party dealing with the director's company was privy to any knowledge pointing to any defect in his appointment or qualification as a director. In other words, those acts were done bona fide at the time that they were done. So, if subsequently or 'afterwards', facts were to emerge which undisputedly showed that the director's appointment or qualification was somehow defective, only then would the saving provisions as envisaged by s 127 of the CA 1965 kick in and immunise those acts which were done in good faith without any knowledge of the *just discovered* defects, subsequent to the commission of those acts by the director.

**[60]** The meaning inherent in that phrase must be that when the subject

director did the impugned acts, he was not aware of the defects that are afflicting or blighting his qualification as a director. By that same token, it would be inimical to common sense if a director can be allowed by law to do acts in his capacity as a director when at the same time he was in full knowledge of the fact as regards his legal status as a director. It would be inimical to the provisions of s 125(1) of the CA which prohibit an undischarged bankrupt from being appointed as a director as he is an undischarged bankrupt without permission from the relevant authority. It would indeed be inimical as well to the provisions of s 38(1)(d) of the BA 1967.

**[61]** So, to our minds, s 127 of the CA 1965 despite its apparent wide ambit, actually is not an all-encompassing saving provision. It is not couched in such a manner as to override all other provisions, either in the CA 1965 or in the BA 1967. We observe the absence of two critical drafting phrases in s 127 of the CA 1965 that would otherwise have conveyed such an overarching meaning and effect to be assigned to s 127 of the CA 1965. Examples of these phrases would be: 1 'Notwithstanding any other provisions to the contrary in this Act'; or 2 'Notwithstanding any provisions to the contrary as a contained in any other Acts' or any other phrases in formulations that would have the like effect. However, having said that, we also observe that neither is s 127 of the CA 1965 being made subservient to other provisions in the CA 1965 or to the BA 1967 or to any other statutes. At the highest therefore, it stands on equal footing with other general provisions in the CA 1965. It comes down as to how it ought to be interpreted in the context in which its provisions are being invoked in a given case. So yes, this seemingly 'simple' question posed by learned counsel for Sazean Engineering, has been quite anything but.

**[62]** That, to our minds, would give the appropriate flavour to what was intended by Parliament when it decided to use that phrase over other words at its disposal. Such interpretation would also be harmonious with the other provisions on the role of a bankrupt in the commercial world as contained under the Companies Act 1965 and the Bankruptcy Act 1967.

**[63]** Applying our finding on s 127 of the CA 1965 to the factual matrix in this case, the inevitable conclusion must be that the acts of Bernard Lim in relation to the resolutions to which this appeal is related, could not be saved by a purported invocation of s 127 of the CA 1965. The undisputed material facts obtaining in this case have revealed that Bernard Lim was aware of his bankruptcy since 2014 and so did Bumi Bersatu. It was not disputed that Sazean Engineering was not aware of the bankrupt status of Bernard Lim that had effectively rendered him disqualified as a director until much later. Premised upon the above matrix, it will be stretching it too far to even suggest that, when Bernard Lim and the BOD passed those resolutions under the circumstances then prevailing, they were acting bona fide and in good faith. As

such, those acts could not be saved within the framework as envisaged by s 127 of the CA 1965.

**[64]** As regards the issue of *ratification*, the affidavits adduced in the High Court did not advert to any such act of ratification by Bumi Bersatu. A ratification is an act that serves to forgive acts of members of the BOD done in the interest of the company but on excess of the jurisdiction assigned to the director in order to achieve the objective of the company. Indeed there was no evidence of ratification by Bumi Bersatu in this case. In any event, legal incapacity cannot be ratified. We refer to the case of *Goldtrail Travel Ltd v Aydin* [2014] EWHC 1587 (Ch) where the English High Court held that a director of a company who had breached his fiduciary duties as a director could not then, in his capacity as the company's sole shareholder, ratify the breach where the company was insolvent.

**[65]** A director's breach of duty can be ratified by subsequent resolution of the shareholders. Some acts are incapable of ratification, such as where the act under scrutiny is a fraud on the minority shareholders; where the act was dishonest or where the act was inherently unlawful, such as the payment of an unlawful dividend. A breach by the director may be ratified provided the relevant *breach* did not involve unlawful conduct (see *Rolled Steel Products (Holdings) Ltd v British Steel Corpn* [1986] Ch 246 (CA)).

**[66]** In this instant appeal before us, the acts of Bernard Lim in taking part in the passing of the impugned Bumi Bersatu's BOD resolutions in 2012 and 2014 were so done in direct contravention of the BA 1967 as well as the CA 1965 pertaining to prohibited acts of an undischarged bankrupt as alluded to in the above paragraphs, prior. We are of the respectful view that such resolutions brought about, inter alia, by acts of Bernard Lim when he was an undisputedly undischarged bankrupt, could not be ratified subsequently. Such acts went to the competency of the BOD to pass a valid and legal resolution. In this case, the impugned resolutions were passed when Bumi Bersatu had only one legally competent director when the law then required that there must be at least two valid and legally competent directors at any given time when the resolutions were passed. Ratification cannot extend to forgiving acts which are done against the law of the land. Such an act is beyond ratification.

**[67]** The impugned resolutions passed by Bumi Bersatu's BOD when there was only one legally competent director remaining director were acts done without the legal competence of the said BOD and were thus illegal. As such, the impugned resolutions did not clothe Bumi Bersatu with the legal authority to file for adjudication proceedings/hearings and to appoint the solicitors to represent it at the same adjudication proceedings. Section 127 of the CA 1965

could not with respect be invoked to 'save' those acts in the form of the impugned resolutions.

**[68]** On the non-ruling on the stop work order and the final accounts, we agree with Bumi Bersatu. That goes to the merits of the adjudication and therefore not within the scope of s 15 of the CIPAA challenge.

CONCLUSION

**[69]** The law is clear in that a bankrupt cannot become a director as per s 125 of the CA. Regulation 72 of Bumi Bersatu company's Articles stipulated that a director who has been declared a bankrupt shall vacate his office as such. The vacancy of Bernard Lim's office as director was created as a result of what is *required* by law because of his bankruptcy, not because he had *opted* of his own accord or volition to resign from that office. The relevant legal provisions in place on the effects of bankruptcy conspired against him as a matter of course, the moment he was declared a bankrupt and remained an undischarged bankrupt. As such, the provisions under s 122(6) of the CA 1965 ought not to apply. Instead, s 122(7) of the CA 1965 ought to be invoked, resulting in Bumi Bersatu breaching the minimum number of directors when Bernard Lim was disqualified as a director of Bumi Bersatu on account of his bankruptcy in 2012.

**[70]** As such, being no longer a valid director of Bumi Bersatu when the impugned resolutions were passed, Bernard Lim's acts that formed part and parcel of those resolutions could not be saved under s 127 of the CA 1965. His acts could not be saved under s 127 of the CA 1965 as well because of the phrase 'notwithstanding …' appearing in the said section. Even assuming that Bernard Lim was a director at the times when the impugned acts were done by him, nevertheless he was aware of his status as a bankrupt and so did the company. As such he had not acted in a manner that could be viewed as being bona fide. He committed contempt of court by acting in defiance of his bankrupt status. The phrase 'notwithstanding …' under s 127 of the CA 1965 presupposes that at the times when the impugned acts were done by a company's director he and the company or the transacting third party was not aware of any defect pertaining to his qualification as a director, to wit his bankruptcy in 2012. The impugned acts would only be saved by s 127 of the CA 1965 if the defect pertaining to his qualification was a fact not already known to Bernard Lim, the company or third party transacting with such knowledge, at the material times. Thus, the use of the words 'subsequently discovered' within the phrase 'notwithstanding …' in s 127 of the CA 1965. To our minds, that phrase seeks to weed out from immunity under s 127 of the CA 1965, any acts done by a director of a company who was aware of his bankrupt status and still despite that fact, had continued to participate in the running of

the company with eyes wide open to the defect of his qualification, at the times when he did the impugned acts. Needless to say, he had acted in defiance of the legal embargo set by law against him. In other words, the acts done must have been done bona fide by a director who at the time when he did those acts, he was not aware of his bankruptcy. The factum of his bankruptcy was not yet *discovered* at that material time. In the language of s 127 of the CA 1965 it was only *subsequently discovered.* Expressed differently, s 127 of the CA 1965 operates like so: acts by a director of a company which were done bona fide at the time of the transaction could not be struck down later as being bad if subsequently it was discovered that in fact the said director's appointment or qualification as such was actually defective in law. In other words,s 127 of the CA 1965 was intended to save acts which were done out of inadvertence in good faith, as opposed to those acts which were done deliberately out of outright defiance with full knowledge of the defects surrounding his appointment as a director.

**[71]** It is our considered view as well, that the fact that the bankrupt could be visited upon with some kind of penal sanctions for breaching the embargo by acting in defiance in spite of his bankruptcy, would not forgive his impugned acts such that they could find a safe harbour and a cloak of immunity under s 127 of the CA 1965. We could not find anything in the language of the relevant provisions both in the CA 1965 and the BA 1967 that could be interpreted in such a manner that would yield such a conclusion as advocated on behalf of Bumi Bersatu. See, for example, the speech of Saville LJ in the English case of *Hughes v Asset Managers plc* [1995] 3 All ER 669 where the learned Lord Justice had occasion to say thus: 'Decisions on different statutes using different words and directed at different ends are necessarily of limited assistance in this regard'.

**[72]** As such, it is our considered view that s 127 of the CA 1965 is well circumscribed in the extent of its intended protective embrace. Clearly, it was not couched in such a manner, in terms of its legislative language, that would suggest that it was intended to have an over-riding or over-arching effect over other provisions either in the CA 1965, the BA 1967 or for that matter, any other statutes in force. It has to be interpreted harmoniously with the other provisions so as to avoid doing irreparable damage to other provisions so closely related to effects the bankruptcy as provided by statutes. Much less, s 127 of the CA 1965 ought not to be construed in isolation, for to do so may yield a result so perverse that it makes no sense of the other related provisions that already exist pertaining to a bankrupt's status and how it is supposed to be an infirmity and a legal disability.

**[73]** There was no evidence of ratification having been subsequently passed to forgive the lapses committed by the BOD which at all material times had

only one valid director. In any event, ratification could not have been feasible in the circumstances of this case.

OUR FINAL ORDER

**[74]** Premised on the above, we allow this appeal with costs. The order of the High Court dated 20 September 2016 is set aside. We grant the reliefs as sought for under prayer (1) in the OS of Sazean Engineering.

**[75]** After hearing submissions by both parties, we award costs to Sazean Engineering, for here and below in the sum of RM20,000 subject to payment of allocator fees. Deposit is refunded to Sazean Engineering, being the appellant in this appeal.

*Order accordingly.*

Reported by Ashok Kumar